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In The
Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,

Respondents.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF FOR AMICI CURIAE IN SUPPORT OF
RESPONDENTS' OPPOSITION TO THE UNITED
STATES SOLICITOR GENERAL'S PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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This brief in opposition to the Petition for Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996 is presented on behalf of the undersigned with consent of all parties. *Amici Curiae* supports Respondents and respectfully requests this Court to deny the Petition for Writ of Certiorari.

INTEREST OF *AMICI CURIAE*

Cal-Almond, Inc., Gold Hills Nut Company, Inc., Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, Frazier Nut Farms, Inc., Theron Shamgochian, Inc. dba Monte Cristo Packing Company, Beards Quality Nut Company, Amaretto Orchards and Bal Nut, Inc. are all almond handlers regulated by the Almond Marketing Order (7 C.F.R. § 981.1, *et seq.*) issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, and are required under the Act and the Order to pay assessments for mandatory promotion and advertising, similar to the mandatory advertising and promotion program presented on the Petition for Writ of Certiorari. These almond handlers are all currently challenging, and several have successfully challenged in the past, the Almond Marketing Order advertising and promotion program regulations and assessments. Cal-Almond successfully convinced the Ninth Circuit Court of Appeals to rule that the assessments for promotion and advertising violated the handlers' rights guaranteed under the First Amendment of the United States Constitution, in a case prominently cited by the Solicitor General in the case herein. *Cal-Almond, Inc., et al. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Bidart Bros. is currently challenging the California Apple Commission advertising and promotion assessments. John I. Haas, Inc. is currently challenging the State of Washington Hop Commission advertising and promotion assessments. Duarte

Nursery, Inc. is currently challenging the California Grape Rootstock Improvement Commission assessments for grape rootstock research and the dissemination of that information. Matsui Nursery, Inc., Kohara Nursery, Inc., Figone Nursery and Fogbelt Growers are currently challenging the California Cut Flower Commission promotion and advertising assessments and program. Donald B. Mills, dba DBM Mushrooms is currently challenging the Federal Mushroom Promotion, Research and Consumer Information (7 U.S.C. § 6101, *et seq.*) assessments for advertising and promotion. David Moss, dba TJ Farms, is currently challenging the California Kiwifruit Commission assessment for promotion and advertising. Gallo Cattle Company is considering a challenge to the National Dairy Promotion Program (7 U.S.C. § 4501, *et seq.*) and the California Milk Advisory Board promotion and advertising program and assessments.

All *Amici Curiae* contend that the Ninth Circuit Court of Appeals decision in *Wileman Bros. & Elliott, Inc., et al. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) was correctly decided by the Ninth Circuit and believe that the Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1. Many of the names of *Amici Curiae* were mentioned in Footnotes 21 and 22 of the Solicitor General's Petition for Writ of Certiorari. *Amici Curiae* offer this brief in support of the Respondents' Opposition to the Solicitor General's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1.

USDA ordered Respondents to pay millions of dollars a year to a Board of their competitors to support a program of

advertising and promotion they bitterly opposed. The Ninth Circuit found this particular program violated Respondents' First Amendment rights to free speech. Reduced to its bare essentials this is a "give us your money and we'll speak for you, — whether you like it or not" — program.

First, the Ninth Circuit decision does not conflict with any decision of this Court. It has been settled since at least 1980 that commercial speech cases are subject to the four part analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557, 100 S. Ct. 2343, and most recently applied by this Court in its unanimous opinion, *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585 (1995). The only dispute in this case involves the third and fourth prongs of the *Central Hudson* test to the unique facts of this case, *i.e.*, whether the Government's mandatory assessments for promotion and advertising "directly advance" its asserted interest in expanding the consumption of peaches, plums and nectarines, and raising income to producers, and whether this program is narrowly tailored to achieve that goal.

Second, the Ninth Circuit correctly applied the analysis in *Central Hudson* in reaching the conclusion — and based upon substantial evidence — that the Government did not prove that the program and the assessments imposed for the same substantially advanced the governmental interest, and the Ninth Circuit correctly addressed whether the Government's program was narrowly tailored to achieve that governmental purpose, and held it did not.

Third, the Ninth Circuit Court of Appeals decision is not in conflict with the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), as that case dealt with whether or not the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*)

which imposes mandatory assessments on cattle producers and importers to finance a national beef promotion campaign, violated *Frame's* right of *free association*. The Third Circuit never analyzed the *Frame* case under *Central Hudson*, as the dissent in that case argued that it should, because the majority held that since it was applying the "free association" test (which is a more stringent standard than commercial speech), and since it found that *Frame's* freedom of association rights were not violated by the law, then the program could not, violate commercial free speech rights, as those rights receive less scrutiny than "free association" scrutiny. Moreover, the Court in *Frame* never addressed the *Central Hudson* prong requiring the Government to prove that the Program at issue substantially advances the governmental interest asserted, instead merely commenting that it was "designed" to serve that goal. *Id.* At 1133-34 and n. 12. The *Central Hudson* analysis requires the Court itself to determine whether or not the program substantially advances the governmental interests, not whether Congress (or an agency) *thought* that it would. *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 1798-1800 (1993).

Fourth, the Ninth Circuit has not decided a question of federal law that is of such importance that it should be settled by this Court. The Ninth Circuit decided this case on the merits of the evidence presented by the Government and the Respondents relating solely to whether or not the Government's program of mandatory assessments for peach, plum and nectarine advertisements substantially advanced the governmental goal of expanding consumption and raising producer revenue. The Ninth Circuit found that it did not — *as applied*. The Court limited its holding to the specific program before it (peaches, plums and nectarines), and to the evidence presented before USDA (handlers, like Respondents, must exhaust administrative remedies before the Secretary of Agriculture before resort to the District Court can be had, 7 U.S.C. § 608c(15)(A); *United States*

v. Ruzicka, 329 U.S. 287 (1946)). The Ninth Circuit ruling would not at all control (nor dictate the result of) any court with respect to any other agricultural industry that has a mandatory promotion and advertising program paid for with producer or handler assessments.

Thus, the Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1, and therefore the Petition for Writ of Certiorari should be denied.

ARGUMENT

I.

THE NINTH CIRCUIT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT, AND THEREFORE CERTIORARI IS NOT WARRANTED UNDER SUPREME COURT RULE 10.1(c).

Since at least 1980, when this Court decided *Central Hudson*, *supra*, the law has been clear that commercial speech cases are subject to a four part analysis.¹ The *Central Hudson*

1. Therein this Court stated:

"In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, *supra*, 447 U.S. at 566.

four part test has been applied in every one of this Court's commercial speech cases for the last decade.² The Government does not contend in its Petition that this four part test should be changed. Instead, the Government argues (Pet. pp. 15-16) that the *Central Hudson* test should not be applied to this type of commercial speech case. The Government claims that in this type of program there is no restriction on speech³, but merely compelled assessments for government commercial speech,⁴ but

2. See *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585 (1995); *Florida Bar v. Went-For-It, Inc.*, ___ U.S. ___, 115 S. Ct. 2371 (1995); *Ibanez v. Florida Dept. Of Business & Professional Regulations, etc.*, ___ U.S. ___, 114 S. Ct. 2084 (1994); *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. ___, 113 S. Ct. 2696 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505 (1993); *Board of Trustees of the State University of NY v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028 (1989); *Posadas de Porto Rico Associates v. Tourism Co. Of Porto Rico*, 478 U.S. 328, 106 S. Ct. 2968 (1986).

3. This Court has long held that compelled contribution for others' speech is protected under the free speech clause as equally as restrictions on speech (*Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977); *Lehnert v. Ferris Faculty Assoc.*, ___ U.S. ___, 111 S. Ct. 1950 (1991)) and financial burdens imposed on speakers is also equally protected against (*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 467, 508 (1991); *Forsyth County, Georgia v. The Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2404 (1992)).

4. The Solicitor General's argument (Pet. p. 16, n.9) that compelled contributions for commercial speech, while they might reduce Respondents' funds available for their own promotion and advertising "proves too much" because the same would be true whether the Board used them for advertising or other expenses and therefore does not raise a First Amendment issue, is disingenuous and not supported by any cases. Indeed the compelled contributions are specifically used for others' speech, and no First Amendment protection was sought by Respondents with respect to compelled assessments for nonspeech related expenditures. This Court recently held in *United States*

(Cont'd)

then argues (Pet. pp. 20-21) that even if *Hudson* applied, the Government program satisfied the four part test. The Government argues that the Ninth Circuit application of *Central Hudson* imposed too strict of a standard on the Government. However, this Court unanimously rejected exactly this same exception in *Rubin v. Coors Brewing Co.*, *supra*, 115 S.Ct. at 1589 n.2.

The Solicitor General also argues that Congress should be afforded greater latitude in this type of case (Pet. p. 18). Again, this Court denounced a similar argument in *Coors Brewing Co.*, *supra*, 115 S.Ct. at 1589-90 n.2, wherein the Government argued that the legislature should have broader latitude to "regulate speech that promote socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." The Court rejected any argument to relax the *Central Hudson* standard. *Id.*

Thus, the commercial speech test used by the Ninth Circuit is not in conflict with any decision of this Court, and *certiorari* is not warranted under Supreme Court Rule 10.1(c).

Moreover, the Ninth Circuit's application of the four-part *Central Hudson* test to the particular facts of this case does not conflict with any decision of this Court. Particularly, the Solicitor General argues (Pet. p. 20) that the Ninth Circuit erred when applying the second part of the test, by requiring the Government to "demonstrate that the generic advertising

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v. National Treasury Employees Union, ___ U.S. ___, 115 S. Ct. 1003 (1995) that a federal statute prohibiting the receipt of honoraria by Government employees for giving speeches or writing violated their First Amendment rights, despite the fact the employees were not "prohibited" from speaking; "... its prohibition on compensation unquestionably imposes a significant burden on expressive activity. [citation omitted.]" *Id.* at 1014. See also, footnote 3, *supra*.

program is better at increasing consumption than individualized advertising.' " However, the Ninth Circuit did nothing more than correctly apply the second prong of the *Central Hudson* test, as more directly dealt with by this Court in *Edenfield v. Fane*, *supra*, which held that the Government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, 113 S.Ct. at 1800. Later, this Court in *Ibanez v. Florida Dept. Of Business & Professional Regulation etc.*, *supra*, 114 S.Ct. 2084 at 2089 held that it would not adopt "unsupported assertions" by the Government.

This Court one year later in the *Coors Brewing Co.* Case, applied its "*Edenfield*" scrutiny to this prong of *Hudson* in deciding that the Government had not satisfied its burden of proving that the regulations would curb "strength wars." *Id.*, 115 S. Ct. At 1592.

The Ninth Circuit's application in this case did nothing more than apply this Court's long settled commercial speech jurisprudence, by requiring the Government to prove that if its going to compel the payment of the Respondents' assessment to finance *others'* advertising and promotion, it must show that it can do a better job with that money than the handlers can do in promoting their product in their own targeted markets. After all, if the Government cannot prove that it can perform a better job promoting peaches, plums and nectarines than the individual handlers who do have a financial incentive to promote their product, the regulations do not "substantially advance" the governmental interest, — a mere statement of the obvious. The Ninth Circuit merely applied the evidence to the *Central Hudson* test and the First Amendment prevailed. Thus, the Ninth Circuit decision does not conflict with any decision of this Court. This

Court's string of commercial speech cases from *Central Hudson* forward through *Coors Brewing Co.* and *Florida Bar v. Went-For-It*, makes clear that the commercial speech test is a real life inquiry not merely one of congressional "belief." See, e.g., *United States v. Edge Broadcasting Co.*, *supra*, 509 U.S. ___, 113 S. Ct. 2696; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505. The Ninth Circuit's conclusion is evidentiary in nature and clearly not in conflict with any decision of this Court. Therefore *certiorari* is not warranted.

II.

THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE THIRD CIRCUIT COURT OF APPEALS.

The Solicitor General argues that the Third Circuit's holding in *United States v. Frame*, *supra*, 885 F.2d 1119 (3rd Cir. 1989) would have upheld the generic advertising program that the Ninth Circuit struck down in the present case (Pet. pp. 21-22), but the Third Circuit made no such holding. In that case, there was a First Amendment challenge to the provisions of the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*) that imposed mandatory assessments on cattle producers and importers to finance a national beef promotion campaign. In that case, the Third Circuit applied the free association test as this Court enunciated in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984), which required the Government to demonstrate that the act was adopted to serve a compelling state interest, that was ideologically neutral, and that could not be achieved through means significantly less restrictive of free speech or associational freedoms. *Frame* at 1134. The *Frame* court looked specifically to the facts of the case and the weak objections made by *Frame* to the program.⁵

5. *Frame* was a cattle auctioneer who was required to collect the one
(Cont'd)

The Third Circuit analyzed the economic decay of the beef industry, the program was intended to prevent the collapse of a vital sector of the national economy (*Frame* at 1134-35), and determined that there was a compelling governmental interest for the program. *Frame* at 1134-35. The Court then determined that the program was ideologically neutral, as the Beef Board only sought to bolster the image of beef. (*Frame* at 1135) The Court also found that the degree of infringement on *Frame*'s First Amendment right "appears slight." *Frame* at 1135-36. The Court also noted that *Frame* "has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy." *Frame* at 1136-37.

The *Frame* Court concluded: "In conclusion, although we find that the Beef Promotion Act implicates the First Amendment rights of those obligated to participate, we hold that the Government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal." *Frame* at 1137.

The *Frame* decision is not at odds with the Ninth Circuit's case sought to be reviewed here. The Court did not analyze the case under the *Central Hudson* test (except for a brief passing in footnote 12 of the opinion, *Frame* at 1134). The *Frame* Court never analyzed whether the program substantially advanced that governmental interest, as opposed to merely stating that the Act was "carefully designed to serve that goal." (*Frame* at 1134, n. 12)

(Cont'd)

dollar per head of cattle sold and pay it to the Board. Unlike the facts in the Ninth Circuit case (*Wileman, supra* at 1377-1380), *Frame* was not promoting his product (cattle) nor did he offer evidence the program was ineffective or that he could do a better job with the money promoting the product.

Since the *Frame* case and the Ninth Circuit case can be read in harmony, certiorari is not warranted under Supreme Court Rule 10.1(b).

III.

THE NINTH CIRCUIT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Ninth Circuit has not decided an important question of federal law which has not been, but should be decided by this Court, and therefore certiorari is not warranted under Supreme Court Rule 10.1(c). As discussed above, the four part analysis to be applied in commercial speech cases has been firmly settled since at least 1980 and unquestionably remains viable to day. (*See* footnote 2, *supra*).

The federal judiciary needs no Supreme Court guidance on this well settled test. That the "directly advances" test requires more than a "reasonable belief" by Congress is a founding axiom in this Court's last decade of commercial speech cases and is conclusively resolved by *Edenfield*, *Coors Brewing Co.*, and *Ibanez, supra*.

The Ninth Circuit's decision is extremely narrow and does not present an important question of federal law which should be decided by this Court. The decision invalidates the Government's past nectarine, peach and plum marketing order assessments for promotion and advertising of those commodities. It was *not* a facial challenge decision. It does not preclude the respective boards and the Secretary of Agriculture to impose the assessments again, nor would it preclude the Government in the future from proving that the program does

substantially advance the governmental interest. It further allows the Board to have provisions allowing handlers to receive credit for their own promotional expenditures to insure the program is narrowly tailored. After all if the "interest" the Government asserts is to expand consumption and increase industry revenues, for the Government to mandate payment to *it* for such promotion (speaking) *Central Hudson* merely requires the Government to prove the unremarkable task that it can do it better than those in the business who have the financial incentive to sell as much as they can at the best possible price. "The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it." *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 790-91 (1988). The Government can point to nothing that would indicate "voluntary" speech by those with an incentive to speak, *i.e.*, handlers in the business to make money for themselves and their producers, would not accomplish the same "interest" and *do it* better. Furthermore, the ability of *producers* to voluntarily associate with each other through cooperatives to promote world class brand names such as Sunkist, Ocean Spray and Sun Maid is in no way implicated by the Ninth Circuit decision.

The Ninth Circuit decision is not binding on any other governmental mandatory promotion and advertising program, whether it be a federal program or a state program — as the federal or state government, respectively, can make a showing that other agricultural programs meet the *Central Hudson* test applied by the Ninth Circuit here. All other federal promotion and advertising programs, and state promotion and advertising programs remain in full force and effect, and can be defended by the respective governments when and if other challenges are made. In addition, most of those regulated would be unable to mount any credible challenge to the programs if they do not promote or advertise the products themselves. Many of these

programs are producer funded programs, with the producers not in the business of marketing the product, and the producers therefore are not funding their own expenditures for their own promotional and advertising programs. Thus, despite the doom and gloom painted by the Solicitor General as to how many programs are affected by these decisions, any challenge would only be successful if the Government program is ineffective, or not more effective than what an individual handler or producer could do on their own if left with his or her money to do it in their own targeted markets.

The Solicitor General's statement (Pet. p. 27) that the Ninth Circuit's decision "would apparently invalidate the operation in that circuit of many of the statutorily created generic promotion programs funded by mandatory assessments" is not borne out by the test used by the Ninth Circuit, and perhaps is just an admission by the Solicitor General's office that the Government cannot prove that these programs are effective, *i.e.*, they do not "substantially advance" the Government's asserted interest in orderly marketing, increasing consumption and producer returns.

The Solicitor General's statements (Pet. p. 27) that: "The Ninth Circuit did not base its decision in this case on any features peculiar to the programs at issue here," is meritless, because not only did the Ninth Circuit specifically base its decision on the facts peculiar to the peach, plum and nectarine promotion program (*Wileman* at 1377), but the case it relied upon, *Cal-Almond, Inc., et al. v. United States Department of Agriculture*, *supra*, 14 F.3d 429 (9th Cir. 1993) did as well. (*Id.* at 437-439). These were particular decisions rendered with respect to the particular industries of peaches, plums, nectarines and almonds, and based upon the evidence adduced at the hearings before the Secretary of the United States Department of Agriculture. They were both "as applied" challenges, not only as to the

"substantially advanced" prong but the "reasonable fit" prong.⁶

Based upon all of the above, certiorari is not warranted under Supreme Court Rule 10.1(c).

6. As the *Wileman* Court stated: "The complexity of the legal issues in this case have been matched by their prolixity." *Wileman* at 1373. (And see full discussion at 1377-80 revealing how fact intensive the inquiry was including the fact the ALJ's first decision was 400 pages and the second was 369 pages, *id.* at 1373.) See also the same type of discussion in *Cal-Almond*, *supra* at 437-440 and accompanying footnotes.

CONCLUSION

This case does not meet any of the certiorari criteria set forth in Supreme Court Rule 10.1. The Ninth Circuit's decision represents application of well settled commercial speech principles to a particular factual situation, in a manner entirely consistent with every decision of this Court. Review of this particular case by the Supreme Court would not materially advance commercial speech law. There are no compelling legal or factual issues. The Ninth Circuit's decision does not fill a gap in the law or extend existing law. Further, the Ninth Circuit decision is not in conflict with the Third Circuit's decision in *United States v. Frame*.

Further, this Court has already entertained numerous commercial speech cases since 1993 (*see* footnote 2, *supra*). The Petition should be denied.

Respectfully submitted,

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